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6 Attorneys for Defendants  
 7 SMITHKLINE BEECHAM CORPORATION d/b/a  
 GLAXOSMITHKLINE and McKESSON  
 CORPORATION

8  
9  
10 UNITED STATES DISTRICT COURT

## 11 NORTHERN DISTRICT OF CALIFORNIA

## 12 SAN FRANCISCO DIVISION

13 MOHINDER KHANNA,

14 Plaintiff,  
15 v.  
16 SMITHKLINE BEECHAM  
CORPORATION d/b/a  
GLAXOSMITHKLINE, McKESSON  
PHARMACY SYSTEMS, and DOES ONE  
through FIFTEEN,  
17  
18 Defendants.

19 Case No. 3:08-cv-01131 MHP

20  
21 DEFENDANT SMITHKLINE  
BEECHAM CORPORATION D/B/A  
GLAXOSMITHKLINE'S REPLY  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO STAY

Date: June 9, 2008  
 Time: 2:00 p.m.  
 Courtroom: 15  
 Judge: Marilyn H. Patel

## 22 I.

23 INTRODUCTION

24 Plaintiff has opposed a stay pending transfer to the Avandia® MDL, arguing that:  
 25 (i) the pending Motion to Remand is best considered by this Court; and (ii) a stay will  
 prejudice Plaintiff with “unnecessary delay.” Plaintiff’s Memorandum in Support of  
 Plaintiff’s Opposition to Defendant’s Motion to Stay (“Pl’s Br.”) at 2.

26 Plaintiff’s arguments are without merit, and GSK files this brief Reply to  
 27 emphasize that the interests of consistency and judicial economy are best served by  
 28 allowing the MDL judge to decide the jurisdictional issues in this case.

## II.

THE JURISDICTIONAL ISSUES IN THIS CASE  
SHOULD BE DECIDED BY THE MDL JUDGE

Arguing that McKesson is a proper defendant in this case, Plaintiff urges this Court to deny GSK's Motion to Stay and to decide the pending Motion to Remand.

Plaintiff asserts that McKesson's role with respect to Avandia extended beyond distribution into marketing. Plaintiff is wrong. As GSK has made clear, McKesson did nothing more than pass along unopened bottles of Avandia to hospitals and health care providers. *See Declaration of Greg Yonko* (attached as Exhibit "A" to the Declaration of Krista L. Cosner in Support of GSK's Reply Memorandum of Law in Support of Motion to Stay (hereinafter "Cosner Decl. ISO Reply"). Thus, there is no legitimate claim against McKesson, its joinder being solely to destroy diversity.

The transparency of Plaintiff's strategy is emphasized by a quick review of relevant statistics. To date, there have been 316 Avandia cases filed in the United States. McKesson *has not been named in a single case* except in some of the cases filed in California. Out of 42 total cases filed in California, 18 were filed in federal court. Twenty-four were filed in state court, and *each of these 24 named McKesson as a defendant.* Of these 24 cases, 23 (representing 135 plaintiffs) have been or are in the process of being removed to federal court.<sup>1</sup> Seventeen of these 23 cases have already been transferred to the MDL.<sup>2</sup> Ten of the 17 transferred cases had Motions to Remand pending when transferred.<sup>3</sup> No Motion to Remand has been granted in any case. *See Cosner Decl. ISO Reply, ¶¶ 1-8.*

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<sup>1</sup> The remaining California state court case, *Fabyankovic v. SmithKline Beecham et al.*, was not removed because it included two Pennsylvania plaintiffs, destroying diversity as to GSK. Cosner Decl. ISO Reply, ¶ 9.

<sup>2</sup> There are motions to remand pending in three of the six cases pending transfer to the MDL, the instant case being one of them. Cosner Decl. ISO Reply, ¶ 10.

<sup>3</sup> Motions to remand were never filed in the other seven removed and transferred cases. Cosner Decl. ISO Reply, ¶ 11.

1           The 10 cases that have been transferred to the Avandia MDL with remand motions  
 2 pending include eight cases from the Northern District of California,<sup>4</sup> and two cases from  
 3 the Central District of California –*Johnson v. GlaxoSmithKline, et al.*, and *Boone v.*  
 4 *SmithKline Beecham Corp., et al.*<sup>5</sup> In its Transfer Order, the Judicial Panel on  
 5 Multidistrict Litigation (“JPML”) explained that *Boone*, along with the eight cases from  
 6 the Northern District of California, should be transferred because of the “salutary effect  
 7 of placing all actions in this docket before a single judge” who can ensure a “just and  
 8 expeditious resolution of the issues.” See Transfer Order, *In re Avandia Marketing, Sales*  
 9 *Practices and Products Liability Litigation*, MDL 1871 (“Transfer Order”) (J.P.M.L.  
 10 Apr. 8, 2008) (attached as Exhibit “B” to Cosner Decl. ISO Reply).

11           For exactly the same reasons of consistency and economy, the jurisdictional  
 12 questions raised by this case are best considered by the MDL judge. Plaintiff protests  
 13 that this Court has the right to decide these issues; however, the fact that the Court *can*  
 14 make such determinations does not mean that it *must* or that it *should*. The JPML has  
 15 acknowledged that it is completely appropriate for a case to be transferred to the MDL  
 16 while a remand motion is pending, and for the transferee court to decide the jurisdictional  
 17 issues. See, e.g., *In re K-Dur Antitrust Litigation*, Docket No. 1419, Judicial Panel on  
 18 Multidistrict Litigation, 162 F. Supp. 2d 688, 689 n.4 (2001).

19           There is no good reason for multiple federal courts to consider identical  
 20 jurisdictional issues in this Avandia litigation. The prudent method of addressing these  
 21 issues is to defer decision to the MDL transferee judge who can make consistent

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22           <sup>4</sup> The eight cases removed to the Northern District of California were *Bone, Bowles, Hall, Hefner,*  
 23 *Jefferson, Fisher, Thornton and Upshaw*. All of these cases were related before this Court. As Your  
 24 Honor is aware, prior to argument on the motions for remand and motions to stay, the parties entered into  
 25 a stipulation to stay the proceedings pending the JPML’s ruling on plaintiffs’ opposition to the transfer of  
 each of these matters to the Avandia MDL. Cosner Decl. ISO Reply, ¶ 12.

26           <sup>5</sup> In *Johnson*, plaintiffs failed to oppose the JPML’s conditional transfer order and the matter was  
 27 transferred to the Avandia MDL with plaintiffs’ remand motion pending. In *Boone*, Judge Larson heard  
 28 argument on Plaintiffs’ Motion to Remand and GSK’s Motions to Stay; however, he did not decide either.  
 Rather, by declining to act on the pending motions, he allowed the case to be transferred to the MDL,  
 where the still-pending Motion to Remand will be decided. Cosner Decl. ISO Reply, ¶ 13-14.

decisions across the body of cases already transferred and those awaiting transfer.

III.

**PLAINTIFF WILL NOT BE PREJUDICED BY A STAY**

Plaintiff alleges that he will “be prejudiced by excessive delay and cost of litigating in a foreign and inconvenient forum if the case is stayed and transferred to the Eastern District of Pennsylvania.” PI’s Br. at 4. Plaintiff attributes some of this “prejudice” to the assertion that “this action does not involve the same issues common to the cases pending in the Avandia MDL litigation.” *Id.* To the contrary, Plaintiff’s claims contain identical allegations to those raised by the other cases transferred or awaiting transfer to the Avandia MDL, including (i) whether Avandia caused or substantially contributed to the development of the risk of heart attack or related conditions; and (ii) whether GSK knew that Avandia caused or substantially contributed to the development of the risk of heart attack or related conditions, and failed to warn consumers and the medical community. Moreover, Plaintiff’s “excessive delay” argument is without merit, as Judge Rufe has indicated that she will be ready to address remand motions within the next sixty days.

IV

## **CONCLUSION**

19 For the reasons set forth above and in GSK's Memorandum in Support of its  
20 Motion to Stay, GSK respectfully requests that this Court grant its motion to stay all  
21 proceedings pending transfer of this case to the Avandia MDL.

Dated: May 23, 2008

DRINKER BIDDLE & REATH LLP

/s/ Krista L. Cosner  
**KRISTA L. COSNER**

Attorneys for Defendants  
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CORPORATION d/b/a  
GLAXOSMITHKLINE and McKESSON  
CORPORATION

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13 CORPORATION

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 MOHINDER KHANNA

18 Plaintiff,

v.

19 SMITHKLINE BEECHAM  
20 CORPORATION d/b/a  
21 GLAXOSMITHKLINE, McKESSON  
22 PHARMACY SYSTEMS, and DOES ONE  
23 through FIFTEEN, inclusive,

24 Defendants.

25 Case No. CV-08-1131 MHP

26 **DECLARATION OF KRISTA L.  
27 COSNER IN SUPPORT OF  
DEFENDANT SMITHKLINE  
BEECHAM CORPORATION D/B/A  
GLAXOSMITHKLINE'S REPLY  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO STAY**

28 Date: June 9, 2008  
Time: 2:00 p.m.  
Courtroom: 15  
Judge: Marilyn H. Patel

I, KRISTA L. COSNER, declare:

1. I am an attorney admitted to practice before all courts of the State of  
California and am an Associate with Drinker Biddle & Reath, LLP, attorneys for  
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE ("GSK")  
and McKesson Corporation ("McKesson") (collectively, "Defendants") in this  
action. I make this Declaration based on my personal knowledge, in support of  
Defendant GSK's Reply Memorandum of Law In Support of Motion to Stay. I would  
and could competently testify to the matters stated in this Declaration if called as a  
witness.

1           2. Attached as **Exhibit A** is a true and correct copy of the Declaration of Greg  
 2 Yonko in Support of Notice of Removal and Removal by GSK.

3           3. To date, there have been 316 Avandia cases filed in the United States.  
 4 McKesson has not been named in a single case except in some of the cases filed in  
 5 California.

6           4. Out of 42 total cases filed in California, 18 were filed in federal court.

7           5. Twenty-four cases were filed in state court, and all 24 named McKesson as  
 8 a defendant.

9           6. Of these 24 cases, 23 (representing 135 plaintiffs) have been or are in the  
 10 process of being removed to federal court.

11          7. Seventeen of these 23 cases have already been transferred to the MDL.

12          8. Ten of the 17 cases had Motions to Remand pending when transferred, and  
 13 no Motion to Remand has been granted.

14          9. The remaining California state court case, *Fabyankovic v. SmithKline*  
 15 *Beecham et al.*, was not removed because it included two Pennsylvania plaintiffs,  
 16 destroying diversity as to GSK.

17          10. There are motions to remand pending in three of the six cases pending  
 18 transfer to the MDL, the instant case being one of them.

19          11. Motions to remand were never filed in the other seven removed and  
 20 transferred cases.

21          12. The eight cases removed to the Northern District of California and related  
 22 before this Court were: (1) *Bone, Dorothy, et al. v. SmithKline Beecham Corporation*  
 23 *dba GlaxoSmithKline et al.*, Case No. CV-07-05886 MHP; (2) *Bowles, Richard, et al. v.*  
 24 *SmithKline Beecham Corporation dba GlaxoSmithKline et al.*, Case No. CV-07-06328  
 25 MHP; (3) *Hall, James v. SmithKline Beecham Corporation dba GlaxoSmithKline et al.*,  
 26 Case No. CV-07-05887 MHP; (4) *Hefner, Rose, et al. v. SmithKline Beecham*  
 27 *Corporation dba GlaxoSmithKline et al.*, Case No. CV-07-06050 MHP; (5) *Jefferson,*  
 28 *James v. SmithKline Beecham Corporation dba GlaxoSmithKline et al.*, Case No. CV-07-

1 05888 MHP; (6) *Fisher, George v. SmithKline Beecham Corporation dba*  
 2 *GlaxoSmithKline et al.*, Case No. CV-07-05889 MHP; (7) *Thornton, Hector v.*  
 3 *SmithKline Beecham Corporation dba GlaxoSmithKline et al.*, Case No. CV-07-05890  
 4 MHP; (8) *Upshaw, Ivan v. SmithKline Beecham Corporation dba GlaxoSmithKline et*  
 5 *al.*, Case No. CV-07-05891 MHP. Prior to argument on the motions for remand and  
 6 motions to stay, the parties entered into a stipulation to stay the proceedings pending the  
 7 JPML's ruling on plaintiffs' opposition to the transfer of each of these matters to the  
 8 Avandia MDL.

9       13. In *Johnson v. GlaxoSmithKline, et al.*, plaintiffs failed to oppose the  
 10 JPML's conditional transfer order and the matter was transferred to the Avandia MDL  
 11 with plaintiffs' remand motion pending.

12       14. In *Boone v. SmithKline Beecham Corp., et al.*, Judge Larson heard  
 13 argument on Plaintiffs' Motion to Remand and GSK's Motions to Stay; however, he did  
 14 not decide either. Rather, by declining to act on the pending motions, he allowed the case  
 15 to be transferred to the MDL, where the still-pending Motion to Remand will be decided.

16       15. Attached hereto at **Exhibit B** is a true and accurate copy of Transfer Order,  
 17 *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL 1871  
 18 (J.P.M.L. Apr. 8, 2008).

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27       ///

28       I declare under penalty of perjury under the laws of the United States of America

1 that the foregoing is true and correct. Executed on this 23<sup>rd</sup> day of May, 2008 in San  
2 Francisco, California.

3 Dated: May 23, 2008

4 DRINKER BIDDLE & REATH LLP

5 /s/ Krista L. Cosner  
6 KRISTA L. COSNER

7 Attorneys for Defendants  
8 SMITHKLINE BEECHAM  
CORPORATION d/b/a  
GLAXOSMITHKLINE and McKESSON  
9 CORPORATION

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# **EXHIBIT A**

1 DONALD F. ZIMMER, JR. (State Bar No. 112279)  
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10 GLAXOSMITHKLINE and McKESSON  
11 CORPORATION

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 DOROTHY BONE; DAVID COOK;  
16 JESUS COTA; JO ELLEN GARNER;  
17 BARRON GATTA; CATHY GRAY;  
18 FRANKLIN JENKINS; GREGORY  
19 RODRIGUEZ; ROBERT RODRIGUEZ;  
20 ROGER TAVARES; LAVIOLA  
21 TOWNSEND.

22 Plaintiffs,

23 v.

24 SMITHKLINE BEECHAM  
25 CORPORATION dba  
26 GLAXOSMITHKLINE and McKesson  
27 CORPORATION,

28 Defendants.

Case No.

29 DECLARATION OF GREG YONKO IN  
30 SUPPORT OF NOTICE OF REMOVAL  
31 AND REMOVAL ACTION, UNDER 28  
32 U.S.C. § 1441(B) (DIVERSITY) and 28  
33 U.S.C. § 1441(C) (FEDERAL  
34 QUESTION) OF DEFENDANT  
35 SMITHKLINE BEECHAM  
36 CORPORATION dba  
37 GLAXOSMITHKLINE

38 I, GREG YONKO, declare:

39 1. I am Senior Vice President - Purchasing for McKesson Corporation  
40 ("McKesson"), and make this declaration in support of the Notice of Removal and  
41 Removal Action of defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline  
42 ("GSK") based on my personal knowledge.

43 2. I have been in my current position since 1997, and have been employed by  
44 McKesson for over 25 years. As Vice President of Purchasing, I am responsible for

DRINKER BIDDLE & REATH LLP  
20 Fremont Street, 20<sup>th</sup> Floor  
San Francisco, CA 94105

SPI 13912304

DECLARATION OF GREG YONKO IN SUPPORT OF REMOVAL

CASE NO.

1 purchasing prescription and non-prescription branded product management and  
2 investment purchasing.

3       3.    McKesson was and is a Delaware corporation, with its principal place of  
4   business in San Francisco, California.

4. McKesson was served with the Summons and Complaint in this action on  
October 24, 2007.

5. McKesson consents to the removal of this action.

8        6. McKesson is a wholesale distributor of pharmaceuticals, over-the-counter  
9 and health and beauty products to chains, independent pharmacy customers and hospitals.  
10 As a wholesale distributor, McKesson distributes products manufactured by others. As to  
11 Avandia®, McKesson does not manufacture, produce, process, test, encapsulate, label, or  
12 package, these products, nor does it make any representations or warranties as to the  
13 product's safety or efficacy.

14      7. McKesson distributed Avandia®, manufactured by GSK, along with many  
15 other products of other pharmaceutical companies, to certain drug stores, pharmacies,  
16 health care facilities and hospitals throughout the United States. As stated above,  
17 McKesson did not manufacture, produce, process, test, encapsulate, label, or package  
18 Avandia®, but only delivered the unopened boxes that contained the drug.

19 8. McKesson is one of many suppliers who could have supplied Avandia® to  
20 the numerous pharmacies throughout the United States.

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct, and this declaration was executed on November 16, 2007 in  
23 San Francisco, California.

GREGORYONKO

DRAKE, BIDDLE & REATHROP  
50 Fremont Street, 20th Floor  
San Francisco, CA 94105

# **EXHIBIT B**

A CERTIFIED TRUE COPY

ATTEST

By Mecca Thompson on Apr 08, 2008

FOR THE UNITED STATES  
JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATIONUNITED STATES  
JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATIONUNITED STATES JUDICIAL PANEL  
ON  
MULTIDISTRICT LITIGATION

Apr 08, 2008

FILED  
CLERK'S OFFICEIN RE: AVANDIA MARKETING, SALES PRACTICES  
AND PRODUCTS LIABILITY LITIGATION

MDL No. 1871

## TRANSFER ORDER

**Before the entire Panel:** Plaintiffs in nine actions listed on Schedule A and pending in the Central District of California (one action) and the Northern District of California (eight actions), respectively, have moved, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), to vacate our orders conditionally transferring the actions to the Eastern District of Pennsylvania for inclusion in MDL No. 1871. Responding defendant SmithKlineBeecham Corp. d/b/a/ GlaxoSmithKline (GSK) opposes the motions.

After considering all argument of counsel, we find that these actions involve common questions of fact with actions in this litigation previously transferred to the Eastern District of Pennsylvania, and that transfer of these nine actions to the Eastern District of Pennsylvania for inclusion in MDL No. 1871 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. We further find that transfer of these actions is appropriate for reasons that we set out in our original order directing centralization in this docket. In that order, we held that the Eastern District of Pennsylvania was a proper Section 1407 forum for actions arising from allegations that certain diabetes drugs manufactured by GSK – Avandia and/or two sister drugs containing Avandia (Avandamet and Avandaryl) – cause an increased risk of heart attack and other physical injury, and that GSK failed to provide adequate warnings concerning that risk. See *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 528 F.Supp.2d 1339 (J.P.M.L. 2007).

Movants argue that these actions involve unique claims concerning the marketing and promotion of Avandia in California, and focus on alleged violations of state statutory and common law. Section 1407, however, does not require a complete identity or even majority of common factual and legal issues as a prerequisite to centralization. Transfer under the statute has the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that: (1) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *In re Joseph F. Smith Patent Litigation*, 407 F.Supp. 1403, 1404 (J.P.M.L. 1976); and (2) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.

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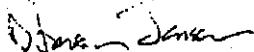
\* Judges Heyburn and Scirica took no part in the disposition of this matter.

- 2 -

Plaintiffs can present their motions for remand to state court to the transferee judge. See, e.g., *In re Ivy*, 901 F.2d 7 (2d Cir. 1990); *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these nine actions are transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Cynthia M. Rufe for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

PANEL ON MULTIDISTRICT LITIGATION



---

D. Lowell Jensen  
Acting Chairman

John G. Heyburn II, Chairman \* J. Frederick Motz  
Robert L. Miller, Jr. Kathryn H. Vratil  
David R. Hansen Anthony J. Scirica \*

**IN RE: AVANDIA MARKETING, SALES PRACTICES  
AND PRODUCTS LIABILITY LITIGATION**

MDL No. 1871

**SCHEDULE A**

Central District of California

Leslie Boone v. GlaxoSmithKline Corp., et al., C.A. No. 2:07-7699

Northern District of California

Dorothy Bone, et al. v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5886

James Hall v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5887

James Jefferson v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5888

George Fisher v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5889

Hector Thornton v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5890

Ivan Upshaw v. SmithKline Beecham Corp., et al., C.A. No. 3:07-5891

Rose Hefner, et al. v. SmithKline Beecham Corp., et al., C.A. No. 3:07-6050

Richard Bowles, et al. v. SmithKline Beecham Corp., et al., C.A. No. 3:07-6328